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IN THE

Supreme Court of the United States

October Term, 1969

No. 951

JAMES C. HAWKINS and RAYMOND MELVIN SHELBY,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WELDON HOLCOMB
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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Rules Involved	3
Concise Statement of the Case	4
Reasons for Granting Writ of Certiorari	5
Conclusion	7
Appendix A — Opinions Below	8
Appendix B — Jurisdiction	15
Appendix C — Concise Statement of the Case	16
Appendix D — Concise Statement of the Case	19
Appendix E — Concise Statement of the Case	21

AUTHORITIES

Cases:	Page
Ball v. State, Tex. Ct. Cr. App., 39 S. W. 2d 619	6
DeLuna v. United States, 5 Cir., 308 F.2d, 140	6
Dunn v. United States, 5 Cir., 307 F.2d 883	6
Ginsberg v. United States, 5 Cir., 257 F.2d 950	6
Handford v. United States, 249 F.2d 295	6
Hayden v. Hoadley, 94 Vt. 345, 111 A. 343	6
Johnson v. United States, 333 U. S. 46	6
Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213	6

AUTHORITIES (Continued)

Page

Nalls v. United States, 5 Cir., 240 F.2d 707 6

Quercia v. United States, 289 U. S. 466 6

Railston v. United States, 5 Cir., 127 F.2d 691 6

Washington v. United States, 327 F.2d 793 6

Constitutional Provisions:

United States Constitution:

Fifth Amendment 2

Statutes:

Federal Statutes:

28 U.S.C. 1254 (1) 2, 4

Miscellaneous:

Wigmore on Evidence, 3rd Edition, Sec. 2113 6

IN THE
SUPREME COURT OF THE UNITED STATES

No.

JAMES C. HAWKINS and
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUDGES OF SAID COURT:

The petitioners, JAMES C. HAWKINS and RAYMOND MELVIN SHELBY, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on October 21, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The judgments of the Court of Appeals, sought to be reviewed, was entered on the 21st day of October, 1969. Motion for rehearing, timely filed, was overruled by the Court of Appeals on the 18th day of November, 1969, and on such date a stay of the mandate was granted to and including the 18th day of December, 1969, to allow your petitioners to file a petition for certiorari in the Supreme Court of the United States. A memorandum of such order is reproduced in Appendix B to this petition. The jurisdiction of this Court is invoked under Title 28, United States Code 1254(1).

QUESTIONS PRESENTED

1. Whether admission of evidence of extraneous criminal acts on the part of the petitioner, JAMES C. HAWKINS, as reflected by the testimony of the witness, Diane Hazelwood, (Tr. 552-555)**, denied said petitioner due process of law under the Fifth Amendment to the Constitution of the United States.

2. Whether the United States Attorney in eliciting the testimony of such criminal acts, even though no objection thereto was interposed by counsel for petitioner, failed to discharge his obligation to insure the fairness and integrity of the trial and protect the substantial rights of the accused, JAMES C. HAWKINS.

3. Whether the Trial Judge in permitting the United States Attorney to elicit the testimony of such criminal

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**(Tr refers to the transcript of the Trial Court appeals.)

acts, in the absence of objection, failed to discharge his role in assuring the accused, JAMES C. HAWKINS, a fair trial according to Federal standards.

4. Whether the questions of the United States Attorney propounded to the petitioner, RAYMOND MELVIN SHELBY, (Tr. 635, 642-644) and the jury argument of the United States Attorney (Tr. 678) denied due process of law to the petitioner, RAYMOND MELVIN SHELBY, under the Fifth Amendment to the Constitution of the United States.

5. Whether the United States Attorney in propounding such questions to petitioner, RAYMOND MELVIN SHELBY, and making such argument to the jury failed to discharge his obligation to insure the fairness and integrity of the trial and protect the substantial rights of the accused, RAYMOND MELVIN SHELBY.

6. Whether the Trial Judge in permitting the United States Attorney to propound such questions to petitioner SHELBY and to make such jury argument, in the absence of objection, failed to discharge his role in assuring the accused, RAYMOND MELVIN SHELBY, a fair trial according to Federal standards.

CONSTITUTIONAL AND STATUTORY RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall be.... deprived of life, liberty, or property without due process of law..."

The statute describing the situations in which a defendant may appeal in a criminal case, 28 United States Code 1254(1), reads in pertinent part as follows:

> "All cases in Courts of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to a ... criminal case before or after the rendition of a judgment or decree."

CONCISE STATEMENT OF THE CASE

These appeals arise from the forgery and passing of postal money orders stolen from a Texas post office. Hawkins and Shelby were jointly tried and convicted. Hawkins appeals from conviction on multiple counts charging violations of 18 U.S.C. §371 (conspiracy to commit any offense against the United States), 18 U.S.C. § 2 (aiding and abetting an offense against the United States), and 18 U.S.C. § 500 (forgery of postal money orders). Shelby appeals from conviction of conspiracy and forgery of a money order.

HAWKINS did not testify in his own behalf upon the trial, nor was his reputation as to any trait of character placed in issue.

A Government witness, Diane Hazelwood, had testified upon the trial to facts tending to connect both Hawkins and Shelby with the offenses alleged in the Indictment. Counsel for Hawkins in cross-examining the witness (Tr. 547) sought to establish the witness's

prejudice towards the appellant, Hawkins, by proving that the witness had filed a complaint against him and later withdrew the same. On re-direct examination, the United States Attorney elicited testimony from the Witness (Tr. 552-555) tending to prove that Hawkins had committed numerous criminal acts upon the witness. Such testimony is reproduced in Appendix C to this petition.

The accused, Raymond Melvin Shelby, testified in his own behalf and as a witness favorable to Hawkins upon the trial of the case. The United States Attorney, in his cross-examination of Shelby (Tr. 635, 643-644) propounded questions calculated to suggest that Shelby had committed perjury and that he had been paid to testify for Hawkins. Such questions are reproduced in Appendix D to this petition. The United States Attorney made the same suggestions in his closing argument to the jury (Tr. 678). Such argument is reproduced in Appendix E to this petition.

Both Hawkins and Shelby timely perfected their appeals to the United States Court of Appeals, Fifth Circuit, and it is the Judgment of the Appeals Court affirming the convictions and the order of the Appeals Court overruling their motion for rehearing that the petitioners seek to have reviewed by this, the Supreme Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

The evidence of extraneous crimes by petitioner Hawkins unquestionably is extremely prejudicial in nature and shows Hawkins to be a violent, evil man.

Railston v. United States, 5 Cir., 127 F.2d 691; Ball v. State (Tex. Ct. Cr. App.), 39 S.W.2d 619; Nalls v. United States, 5 Cir., 240 F.2d 707; and *Michelson v. United States; 335 U.S. 469 S.Ct. 213.*

The United States Attorney, in his cross examination of the witness Diane Hazelwood, went beyond the legitimate purposes which the so-called open door doctrine permits, in that the rule is protective merely and goes only so far as necessary to shield a party from adverse inferences, and only allows an explanation or rebuttal of the evidence received. *Hayden v. Hoadley, 94 Vt. 345, 349; 111 A. 343, 345* and *Wigmore on Evidence, Third Edition, Section 2113.*

Though objection to the testimony was not made by defense counsel, the United States Attorney nevertheless owes a heavy obligation to the accused in a criminal case. *Washington v. United States, 327 F.2d 793; Dunn v. United States, 307 F.2d 883; Ginsberg v. United States, 257 F.2d 950, 954;* and *Handford v. United States, 249 F.2d 295, 296.*

Likewise, a Federal Judge has a decisive role in assuring an accused a fair trial according to Federal Standards. *DeLuna v. United States, 5 Cir., 308 F.2d 140; Quercia v. United States, 289 U.S. 466, 472* and *Johnson v. United States, 333 U. S. 46, 54.*

The question here presented, as above stated, is whether the United States Attorney and the Trial Judge failed to discharge their obligation to the accused and thereby denied the accused, James C. Hawkins, a fair trial according to Federal standards.

It is submitted that the same reasons for granting the writ as to petitioner James C. Hawkins exist as to the petitioner Raymond Melvin Shelby.

CONCLUSION

For the foregoing reasons this writ for certiorari should be granted.

Respectfully submitted,

WELDON HOLCOMB

JOE TUNNELL
302 East Texas Savings & Loan Bldg.
Tyler, Texas 75701
ATTORNEYS FOR PETITIONERS

APPENDIX A

United States Court of Appeals
Fifth Circuit
Office of the Clerk
October 21, 1969

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Re: No. 25013 - James C. Hawkins and Raymond Melvin Shelby vs. U.S.A.

Gentlemen:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgement has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) FRANCES WOLFF
Deputy Clerk

enc.
cc: Mr. Joe Tunnell
Mr. Wm. Louis White

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25013

James C. Hawkins and Raymond Melvin Shelby,
Appellants,

versus

United States of America,
Appellee.

Appeals from the United States District Court for the Eastern District of Texas

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(October 22, 1969)

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge.

GODBOLD, Circuit Judge: These appeals arise from the forgery and passing of postal money orders stolen from a Texas post office. Hawkins and Shelby were jointly tried and convicted. Hawkins appeals from conviction on multiple counts charging violations of 18 U.S.C. § 371 (conspiracy to commit any offense against the United States), 18 U.S.C. § 2 (aiding and abetting an offense against the United States), and 18 U.S.C. § 500 (forgery of postal money orders). Shel-

by appeals from conviction of conspiracy and forgery of a money order.

The evidence was sufficient to support the convictions of both appellants. Shelby's testimony contained admissions sufficient to support his conviction. As to Hawkins, there was evidence that he brought together Burks (who had stolen money orders to sell) and Shelby and Key (who were interested in purchasing them). The evidence showed that Key obtained funds to buy the money orders by delivering jewelry to Hawkins, who obtained money for the jewelry and turned it over to Key. There was evidence that when Key was in California on a trip passing money orders he needed new documents to falsely identify him and sought these from Hawkins in Texas. Upon Key's return to Texas, Hawkins attended a meeting of those engaged in the money order operation and there delivered to Key identification papers bearing the name or names of other persons. At that meeting money order forms were displayed and examined. Also there was evidence that Hawkins received a percentage of the "take" from passing forged money orders.

Government witness Diane Hazelbrook, on redirect examination, gave damaging testimony describing how Hawkins had beaten, kicked and pistol-whipped her, inflicting serious injuries, after forcing her, dressed in her nightgown, to his cabin in the woods, where she was required to stay over night. The testimony carried heavy impact, for it tended to show Hawkins to be a brutal and vicious man. But that avails him nothing on this appeal. The incident was opened up by defense counsel who on cross-examination, sought

to impeach Hazelwood by showing personal animosity against Hawkins evidenced by her filing a criminal complaint against him. The government, on redirect, elicited the details which gave rise to the complaint, without objection from the defense. The testimony was admissible. *Beck v. United States,* 317 F.2d 865 (5th Cir.), *cert. denied,* 375 U.S. 972, 11 L.Ed.2d 419 (1964). In *Beck* the judge gave a cautionary instruction. Here none was given, but none was asked.

Government witness Maxwell testified to a conversation in her presence between Shelby and Key during which Key made known his need for credit cards to serve as means for false identification, and Shelby responded that he had a friend, Hawkins who could supply the credit cards. According to Maxwell's testimony, Shelby described Hawkins as a "fence." Objection was sustained to this characterization as hearsay, and the jury was instructed not to consider the testimony as to Hawkins. Motion for mistrial was denied. There is not presented the matter of a codefendant's confession which tends to show in a direct way that a fellow defendant is guilty of the offense charged, as in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476 (1968), but hearsay testimony of a codefendant's remark which describes his fellow defendant as a "bad man," which may tend to show guilt but in a much less direct manner. In any event, *Bruton* rests upon the right to confrontation and cross-examination of witnesses. Shelby took the stand and testified at length in a vein largely exculpatory of Hawkins. He was not cross-examined about the remark he was said to have made. *Bruton* does not apply. *James v. United States,* 5th Cir. 1969 [No. 26162, Sept. 17, 1969]. Maxwell's

testimony was admissible against Shelby, though somewhat tenuously, going to prove Shelby's entry into the conspiracy.[1]

No reversible error arose from the remarks of the prosecutor in argument. There was evidence that Key had sent $800 to Hawkins. The first prosecutor to argue referred to this as tending to show Hawkins' guilt. The defense argument was not made a part of the appellate record, but from succeeding remarks we may assume that defense counsel sought to explain the $800 as a repayment of $300 that Hawkins had obtained for Key by selling (or pawning) jewelry that Key had turned over to him. In further argument concerning Hawkins' guilt, the closing prosecutor said:

> Oh, the Defense Counsel said, "Well, we don't know how much it was for those rings." — or some such business as that. How much was loaned? What testimony do you have from any source about any lending of any money? Three hundred dollars was mentioned. Three hundred dollars was delivered. Where is there testimony from any other source? There was a man that could have testified to it — his co-defendant here. He took the stand. He could have testified as to what the true bargain was.

---

[1]The Statement was made prior to the beginning of the conspiracy charged in the indictment. Therefore it was not admissible under the exception to the hearsay rule of a statement made during the pendency of a conspiracy by one conspirator to be admitted against another.

What did he say about it? Nothing.

We agree with the trial court that the reference could not be construed as relating to Hawkins. After objection that the remark was a comment on Hawkins' failure to testify, the court gave the following cautionary instruction:

> This is not the Court's view of what the prosecuting attorney said.
>
> You know — I've explained to you before — that no inference can be drawn about the failure of the defendant to testify, and no such inference is to be drawn from what this man said — and this is not an attempt, in the Court's opinion, to do that. He's talking about what the Defendant Shelby, who did take the stand, did not say.
>
> So, the objection will be overruled and the motion will be denied, with this instruction.

Hawkins correctly points out that Shelby was not present at the transaction concerning the jewelry but another person named Lacey was. Nevertheless, the court's failure to correct this factual error (not pointed out to the judge at the time) does not alter the plain import of the remarks, which, in the context of argument of Hawkins' guilt, were directed to the lack of explanation by Hawkins' codefendant who testified. The remark could refer, albeit erroneously, only to Shelby, and not to Hawkins, who could not be his own codefendant and had not taken the stand. Cf. *Peeples*

v. United States, 341 F.2d 60 (5th Cir.), *cert. denied,* 380 U.S. 988, 14. L. Ed.2d 280 (1965); *Smith v. United States,* 234 F.2d 385 (5th Cir. 1956).

Other arguments made by the prosecutors referred to the reasons for Shelby's giving testimony largely exculpatory of Hawkins. The gist of the remarks was that the jury could draw its own conclusions as to Shelby's reasons for admitting the charges against him while seeking to absolve Hawkins. The appellants urge that the remarks are within cases holding it error to charge a defendant with suborning perjury, but we do not reach that issue, because there was no objection and in this instance there was no plain error. Under the evidence the jury was entitled to conclude that Shelby was in fact what was referred to as a "fall guy" for Hawkins.

The question to Shelby, "Why was it that you elected to plead not guilty" was objected to, the jury was instructed not to consider it, and motion for mistrial was denied. It could not have been prejudicial to Shelby because he acknowledged facts which clearly showed his guilt, and, only in the most remote sense could the question attribute any wrong or misconduct on Hawkins' part. This was not reversible error.

AFFIRMED.

APPENDIX B

United States Court of Appeals
Fifth Circuit

Office of the Clerk

November 18, 1969

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 25013 - Hawkins & Shelby vs U.S.A.

Gentlemen:

The following action has this day been taken in the above case:

( ) An extension of time has been granted to and including
  ( ) for filing and docketing record on appeal.
  ( ) for payment of Court costs.
  ( ) for withdrawing record for printing.
  ( ) for filing appellant's printing designation.
  ( ) for filing appellee's printing designation.
  ( ) for filing reproduced copies of the record.
  ( ) for filing appellant's brief.
  ( ) for filing appellee's brief.
  ( ) for filing a petition for rehearing.

( ) Motion to consolidate granted.
( ) Motion to supplement or correct record granted.
( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief in excess of pages under Rule 28(g) F.R.A.P. granted.
( ) Motion for leave to file petition for rehearing in excess of pages under Rule 40(b) F.R.A.P. granted.
(X) A stay of mandate has been granted to and including 12/18/69
( ) The Court's opinion has this day been rendered and a copy thereof is enclosed.
( ) Joint Motion as to time for filing briefs granted.
( ) Order enclosed has been entered.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) A. E. WINDHORST, JR.
Deputy Clerk

cc: Mr. Joe Tunnell
Mr. Richard Brooks Hardee

APPENDIX C

Appellants' counsel in cross-examining the Government's witness, Diane Hazelwood (Tr. p. 547) sought to establish the witness's prejudice toward the appellant HAWKINS by proving that the witness had filed a complaint against the appellant which she later asked the District Attorney to withdraw and that this occurred on or about the time that the witness gave a statement to the postal inspector concerning appellant's connection with the offenses for which he was on trial.

On re-direct examination by the United States Attorney (Tr. pp. 552-555) the following testimony of the witness was elicited:

"Q. Why did you file charges against Mr. Hawkins?

A. He beat me within an inch of my life.

Q. All right; and how long was it after you got back from Houston when he beat you within an inch of your life, as best you can remember?

A. It wasn't long.

Q. Where did it happen?

A. Well, between my front door and the back woods of his cabin.

Q. What were the circumstances? How did you meet on that particular occasion?

A. Well, he had me out of my house by the hair of my head in my nightgown.

Q. And where did he take you?

A. To his little cabin behind the — well, I don't know what road it is. It's in the back woods."

After asking a few unrelated questions, the United States Attorney continued:

"Q. And when you got there what happened?

A. Well, he beat me until I was just more or less unconscious — half out of my mind.

Q. What did he beat you with?

A. His hands, a pistol, his —

Q. He hit you with a pistol?

A. And he kicked me.

Q. All right; and what happened after the beating?

A. I had to stay there overnight.

Q. All right; where did you stay?

A. Right there in that cabin.

Q. Were you in any particular room in the house?

A. It was just —

Q. Did you — Let me ask you this: Did you stay there voluntarily or were you forced to stay?

A. I was forced to stay.

Q. Were you locked in or were you allowed to just roam at will about the house?

A. I wasn't able to move.

Q. All right, when did you leave the house?

A. The next day.

Q. How did you leave?

A. In his car.

Q. Were you able to drive?

A. Barely.

Q. Where did you go?

A. Well, I went straight to my house, and took the dress off that he had given me to put on, and changed clothes, and I had to take his car back out to the club.

Q. Then what happened?

A. Then I went right straight to the Doctor's office.

Q. All right, were you treated?

A. Yes.

Q. How long were you under the doctor's care?

A. For about three weeks.

Q. How often did you see him during that three weeks?

A. Every day.

Q. What did he treat you for?

A. Well, I had stitches in my head, and I had bruises, and — all over me, and I had internal bruises and a cracked rib. My nose was messed up.

Q. All right.

A. I don't remember what all I had. He had a list.

Q. He what?

A. He had a list that long of things.

Q. Now, what caused you to dismiss these charges?

A. It was just one thing right after another happened. I was — I was afraid.

Q. You were afraid of him?

A. Yes.

Q. Did you have any conversations with him after this?

A. Yes.

Q. Had he offered you employment at the time that you dismissed the charges?

A. That come after I dismissed the charges.

Q. Are you still afraid of him?

A. Yes."

APPENDIX D

It is submitted that the prejudicial effects of the above argument is shown by the following questions propounded by the United States Attorney upon the trial to the witness RAYMOND SHELBY. At page 635 the United States Attorney propounded the following questions:

"Who is bearing the expense of your lawyers in this case?"

To which question the Court sustained an objection. At page 642 the witness was asked:

"Why was it that you elected to plead not guilty in this case?"

The Court overruled appellant's motion for mistrial based upon the asking of the question, but instructed the jury as follows (Tr. pp. 642-643):

"But I do instruct the jury that you will not consider that, because it has nothing to do with this case. Don't consider it. It's improper."

Immediately following such instruction the United States Attorney propounded the following questions (Tr. pp. 643-644):

"Q. Let me ask you this, Mr. Shelby: Have you made any kind of an agreement with Mr. Hawkins that you will take a fall for him; in other words, come in here and admit to all of it and try to get him — keep him from being convicted by your testimony? Have you made any such agreement as that with Mr. Hawkins?

A. Sir, I didn't make an agreement with you and I didn't make an agreement with anybody else.

Q. You have not made any such agreement?

A. None whatsoever.

Q. Sir, I will ask you specifically if he has of-

fered to give you a sum of money for your testimony in this trial?

A. I figure friendship, sir, is stronger than money.

Q. So you are in here, then, on account of your very, very strong friendship for Mr. Hawkins. Is that it?

A. No, sir.

Q. Well, what reason — why are you getting up here, then?

A. I'm up here, sir —"

APPENDIX E

And the United States Attorney in his closing argument (Tr. p. 678) stated the following:

> "And I feel a little bit sorry for Raymond Melvin Shelby. He has been thrown to the wolves here. He is the fall guy. He's the fellow that they bring in here for some reason — and you can draw your own conclusions as to that — to try to swear away the obvious guilt of his co-conspirator. Now, you can draw your own reasons or conclusions as to why a man would come in here and do what he has done; cheerfully admit to everything that is charged against him in the indictment, but try to swear away — try to absolve his co-conspirator. Like I say, you can draw your own conclusions."